

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION**

GREGORY PRODUCTIONS, INC.

PLAINTIFF

vs.

Civil Action No. 2:96cv24-D-A

TRIMARK PICTURES, INC.

DEFENDANT

MEMORANDUM OPINION

Presently before the court is the motion of the defendant, Trimark Pictures, Inc., to dismiss, or in the alternative, transfer this cause. Finding the motion well taken, the same shall be granted in part, and this cause shall be transferred to the United States District Court for the Central District of California.

Factual Background¹

Gregory Productions, Inc., ("Gregory") is a Delaware corporation engaged in the production of motion pictures, with its primary place of business located in Southaven, Mississippi. Trimark Pictures, Inc., ("Trimark") is a California corporation engaged in the business of motion picture distribution and maintains its principal place of business in Los Angeles, California.

Sometime in late 1995 or early 1996, the parties entered into negotiations concerning distribution rights of Gregory's first production, entitled "Care of the Spitfire Grill." Representatives of Trimark, including Mr. Bobby Rock, attended a screening of the then-uncompleted film in Memphis, Tennessee, on October 18, 1995. Negotiations for the distribution rights of the film later began in Los Angeles, involving Trimark representatives and California-based agents of Gregory. These negotiations ensued through January 1996, and at issue in this case is the validity and breach of agreements allegedly reached during these negotiations. On January 18, 1996, representatives of both sides attended the Sundance Film festival in Park City, Utah, where "Care of the Spitfire Grill" was shown. By January 24, 1996, Gregory reached an agreement for the purchase and sale of an

¹ The court initially notes that neither party to this action has requested that this court conduct an evidentiary hearing in relation to these motions at bar. This court believes that there exist sufficient facts which are uncontested between the parties to make its decision today.

exclusive distribution license to Castle Rock Entertainment ("Castle Rock"), another California-based distributor of motion pictures. Upon learning of the Castle Rock deal, Trimark made comments to the press concerning the distribution rights to Gregory's film and potential litigation over those rights.

Gregory filed this action on January 26, 1996, seeking a declaration of rights as between it and Trimark concerning distribution rights of "Care of the Spitfire Grill." On January 31, 1996, Trimark filed an action against Gregory in the United States District Court for the Central District of California.² In the California action, Trimark seeks damages for the alleged breach of an "Exclusive Dealing Agreement" concerning the distribution rights Gregory agreed to sell to Castle Rock. On February 12, 1996, Trimark moved this court to dismiss the plaintiff's claims, or in the alternative transfer this cause to the Central District of California for final disposition.

DISCUSSION

I. DISMISSAL OF THE PLAINTIFF'S CLAIMS FOR "FORUM SHOPPING"

Trimark's initial argument is that "[t]his Court should recognize Gregory's attempt to use the Declaratory Judgment Act as a forum shopping device and should dismiss Gregory's declaratory relief action." Trimark's Brief in Support of Motion to Dismiss or in the Alternative Transfer, p.6. This court may not dismiss an action for declaratory relief "on the basis of whim," and any such dismissal must be supported by written or oral explanation. Odeco Oil & Gas Co. v. Bonnette, 4 F.3d 401, 404 (5th Cir. 1993). This court does, however, have a wide variety of factors it may consider in making a discretionary decision regarding dismissal, for this court is not required to decide a declaratory judgment action. Carney v. Resolution Trust Corp., 10 F.3d 1164, 1172 (5th Cir. 1994). The factors include:

- 1) a pending state court action in which the matters in controversy may be fully litigated;
- 2) that the declaratory judgment was filed in anticipation of another suit and is being used for the improper purpose of forum shopping;

² The action, which is currently pending in that court, is styled Trimark Pictures, Inc. v. Gregory Prod., Inc., Case No. 96-0687 (C.D. Cal.).

- 3) the possible inequities in permitting the plaintiff to gain precedence in time or forum;
- 4) inconvenience to the parties or witnesses; or
- 5) whether retaining the lawsuit in federal court would serve the purposes of judicial economy.

St. Paul Ins. Co. v. Trejo, 39 F.3d 585, 590 (5th Cir. 1994); Carney, 10 F.3d at 1172-73 (citing Rowan Co's. v. Griffin, 876 F.2d 26, 28 (5th Cir. 1989)). As noted by Trimark, one of the relevant factors is whether the plaintiff is "forum shopping" in anticipation of another lawsuit. Gregory counters that knowledge of an impending lawsuit is a key factor for establishing the "actual controversy" requirement required for this court to even entertain an action for declaratory relief in an intellectual property context:

The district court lacks subject matter jurisdiction to issue a declaratory judgment unless an "actual controversy" exists . . . [A]n "actual controversy exists in an intellectual property case when both prongs of a two-pronged test are satisfied - (1) **when the declaratory plaintiff has a real and reasonable apprehension of litigation** and (2) when the declaratory plaintiff has engaged in a course of conduct that brings it into adversarial conflict with the declaratory defendant.

State of Texas v. West Pub. Co., 882 F.2d 171, 175 (5th Cir. 1989) (emphasis added); see also First Gibraltar Bank, FSB v. Morales, 19 F.3d 1032, 1038 (5th Cir. 1994) (noting two-part test only applies in intellectual property context). In light of this court's transfer of this action as explained later in this opinion, the undersigned will not today attempt to resolve the matter. However, the court does note that the above four factors for dismissal of a declaratory judgment action are not mandatory, but rather suggested factors to which the court may look in deciding the issue:

Rowan does not require a district court to examine each of the listed factors. The Rowan court only stated that these were only examples of the variety of factors that a district court could look to in determining whether to decide a declaratory judgment action. Rowan does not set forth a four-factor test for district courts to follow.

Carney, 10 F.3d at 1173. Having delineated the problem, the court now turns to the defendant's alternative motion to transfer venue.

II. TRANSFER OF VENUE PURSUANT TO 28 U.S.C. § 1404(a)

For the convenience of the parties and witnesses, in the interests of justice, a district court may transfer any civil action to any other district or division where it might have

been brought.

28 U.S.C. § 1404(a). "Decisions to effect 1404(a) transfers are committed to the sound discretion of the trial judge, and review of a transfer is limited to an abuse of that discretion." Mills v. Beech Aircraft Corp., Inc., 886 F.2d 758, 761 (5th Cir. 1989) (quoting Jarvis Christian College v. Exxon Corp., 845 F.2d 523, 528 (5th Cir. 1988)). The purpose of the venue transfer statute is to "prevent the waste of time, energy, and money and to protect litigants, witnesses, and the public against unnecessary inconvenience and expense." Gundle Lining Const. v. Fireman's Fund Ins., 844 F. Supp. 1163, 1165 (S.D. Tex. 1994) (citing Van Dusen v. Barrack, 376 U.S. 612, 616, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964)). In order to establish that transfer is appropriate, this court would have to find that the defendant Trimark has carried its burden to establish that the balance of convenience and justice weigh heavily in favor of the transfer. Gundle, 844 F. Supp. at 1165. There exists a veritable plethora of factors this court may consider in making a § 1404(a) determination, which include:

- 1) the convenience of the parties;
- 2) the convenience of material witnesses;
- 3) the availability of process to compel the presence of unwilling witnesses;
- 4) the cost of obtaining the presence of witnesses;
- 5) the relative ease of access to sources of proof;
- 6) calendar congestion;
- 7) where the events in issue took place; and
- 8) the interests of justice in general.

Id. at 1165.

There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation.

Embree v. Cutter Biologics, 760 F. Supp. 103, 105 (N.D. Miss. 1991) (citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947)); see also Apache Products Co. v. Employers Ins. of Wausau, 154 F.R.D. 650, 653 (S.D. Miss. 1994) (listing factors for consideration in § 1404(a) analysis). In the case at bar, it is the opinion of the undersigned that the defendant has established that these factors overall weigh heavily in favor of transfer.

The only relevant consideration that this court finds weighing strongly in favor of non-transfer is the plaintiff's choice of forum, especially in light of the fact that this is the district wherein the plaintiff's principal place of business is located. Normally, a plaintiff's choice of forum is entitled to substantial deference by the court. Apache Prods., 154 F.R.D. at 653. This is particularly true when "the forum it chooses is in the district within which [it] resides." Id. (citing Sorrels Steel Co. v. Great Southwest Corp., 651 F. Supp. 623 (S.D. Miss. 1986)). However, while the plaintiff's choice of forum may be entitled to some degree of greater consideration, it is by no means determinative. Gundle, 844 F. Supp. at 1165 (noting plaintiff's choice of forum not entitled to "the decisive weight it enjoyed under the doctrine of *forum non conveniens*"). "[W]here the defendant does show that another forum is significantly more convenient for the parties and witnesses, and that there appear to be no substantial impediments otherwise to transfer, the plaintiff's choice of forum must give way and the court should not hesitate to order a transfer." Apache Prods., 154 F.R.D. at 653; see also Gundle, 844 F. Supp. at 1165 (stating "choice of forum is only one of many factors to consider.").

When looking to the remaining factors, California has a much more significant relationship to this action. For example, the majority of witnesses and most of the evidence is there, California law has a great potential for application to the case, the California court has a greater ability to compel the presence of unwilling witnesses, and the occurrence of most of the events relevant to this cause was either in or very near California - all of these weigh in favor of transfer. The location of witnesses and evidence also "necessarily implicate[s] the ease of conducting merits-related discovery in a location which is near the relevant witnesses and documents." Enplanar, Inc. v. Marsh, 11 F.3d 1284, 1291 (5th Cir. 1994). Even when considering the relative worth of each element, these factors in the aggregate substantially outweigh the plaintiff's choice of forum in this matter. Considering today's technological capabilities for communication and travel, trying this case in a north Mississippi courtroom would not quite be the same as if it were "consigned to the wastelands of Siberia," but it would nonetheless be a significantly more inconvenient forum for both parties and witnesses. Mills,

886 F.2d at 761. Further, as already noted, calendar congestion is also an appropriate factor to consider:

Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin.

Embree, 760 F. Supp. at 105 (citing Gulf Oil, 330 U.S. at 508). This factor also favors transfer of this action. According to the most recent annual statistics compiled by the Administrative Office of the United States Courts, the overall caseload in the year for the Central District of California was three-hundred and twenty-three (323) actions per District Judge. In contrast, each District Judge in the Northern District of Mississippi carried five hundred and five (505) cases. Because of this discrepancy in caseloads, an average civil cause in the Central District of California took six (6) months to run from filing to disposition, while in this district the average civil case took twelve (12) months to be completed. Judicial efficiency, and therefore the public interest, would also be best served by transfer in this case. See Gundle, 844 F. Supp. at 1167 (noting comparative docket congestion proper factor to consider).

CONCLUSION

Upon consideration of relevant factors and in the exercise of this court's discretion, it is the opinion of this court that this cause should be transferred to the United States District Court for the Central District of California, for the convenience of the parties and witnesses in this cause, and in the interests of justice.

A separate order in accordance with this opinion shall issue this day.

THIS the ____ day of March, 1996.

United States District Judge

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PLAINTIFF

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TRIMARK PICTURES, INC.

DEFENDANT

**ORDER GRANTING MOTION TO TRANSFER VENUE
AND DENYING MOTION TO DISMISS AS MOOT**

Pursuant to a memorandum opinion issued this day, it is hereby ORDERED THAT:

1) the motion of the defendant Trimark Pictures, Inc., to transfer venue of this cause is hereby GRANTED for the convenience of the parties and witnesses in this cause, and in the interests of justice. This matter is hereby TRANSFERRED to the United States District Court for the Central District of California for consolidation with related proceedings already pending before that court, or for any other action which that court deems appropriate.

2) in light of this court's transfer of this action, the motion of the defendant Trimark Pictures, Inc., to dismiss this action is hereby HELD IN ABEYANCE for consideration by the transferee court.

SO ORDERED, this the ____ day of March, 1996.

United States District Judge